No. 89-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FAIRCHILD INDUSTRIES, INC.,
Petitioner,
vs.
DIANE MILLER and PAMELA LEWIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TYRON J. SHEPPARD

Suite 1550
3550 Wilshire Boulevard
Los Angeles, California 90010
(213) 387-7704

Attorney for Respondents

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Diane Miller and Pamela Lewis respectfully pray that the petitioner Fairchild Industries, Inc.'s Petition for Writ of Certiorari be denied for the reasons set forth below.

STATEMENT OF THE CASE

In the fall of 1982, both respondents independently and unknown to each other signed settlement contracts with Fairchild. Respondents had sought the administative assistance of the Equal Employment Opportunity Commission (EEOC) to enforce the terms and conditions of their employment contracts with Fairchild.

Pursuant to the settlement contracts Fairchild agreed to provide previously denied training benefits over a period of time, along with other promises. Fairchild could not provide any of the promised benefits unless respondents remained employed. In return for Fairchild's promises, both respondents relinquished their right to sue Fairchild under Title VII (42 U.S.C. § 2000(e) et seq.)

Within weeks after each of the settlement contracts were signed, Fairchild fired each respondent without cause claiming economic reasons. None of the major contractual promises of Fairchild was executed prior to the firings.

REASONS FOR DENYING THE WRIT

I.

The Ninth Circuit decision on respondents' Section 1981[1/] claim does not conflict with (A) Patterson v. McLean Credit Union,[2/] (B) the decision of another Ninth Circuit panel or (C) the decision of other circuits.

A. The Ninth Circuit decision in this case is in harmony with Patterson.

[1/] 42 USC § 1981

[2/] 109 S.Ct. 2363 (1989)

In Patterson, the court was concerned with post-formation conduct which interferred with the right to enforce a contract through legal and administrative process. Retaliation has long been recognized by this and other pre-Patterson courts as a violation of Section 1981.

Patterson did not address or consider retaliation. The holding was focused on post-formation harassment. Implicit in the decision, however, was the assumption that the contract at issue was not tainted by unstated pre-formation intent which would nullify the mutual, good faith bargaining state of mind necessary for contract formation.

One who goes through the motions of preparing and signing a contract with a retaliatory motive to be carried

out in the future cannot be said to have "made a contract" if the effect of the retaliation removes all contract benefits from the aggrieved party. Such conduct is the equivalent of refusing to enter into a contract for retaliatory reasons.

Fairchild's swift retaliation in firing within weeks the only employees with executory settlement contracts negates any inference that Fairchild intended to be bound by its contract. In fact, the immediate termination of respondents proves that Fairchild itself did not believe the contracts existed.

The court did not intend the Patterson opinion to stand for the use of sham contracts to escape the reach of Section 1981. Patterson does not support the result Fairchild seeks. The

Ninth Circuit opinion should not be disturbed.

B. The full court considered Fairchild's petition for rehearing and the panel decision, without objection, thereby nullifying any argument of conflict within the Ninth Circuit.

Fairchild claims that this decision conflicts with the decision of another Ninth Circuit panel in Overby v. Chevron USA, Inc., 884 F.2d 470 (9th Cir. 1989). Even though Overby was decided two weeks before the filing of the amended opinion, and Patterson long before that, Fairchild never raised the Section 1981 issue. Fairchild cannot raise the issue now.

More important, however, is the last paragraph of the September 19, 1989, order.

> "The petitions for rehearing and suggestions for rehearing en banc and this order have been circulated to the full court. No member of the court has requested rehearing beyond the amendments provided in this order. Accordingly, the appellee's petition for rehearing and suggestion for rehearing en banc are denied." 3/

Since all members of the Ninth Circuit have considered the order without objection, there is no conflict.

Overby can also be distinguished on the facts. The protected activity in Overby occurred many years before the alleged retaliatory act. Plaintiff probably would not have prevailed on a retaliation theory pre-Patterson. Most

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3/ Miller v. Fairchild Order amending opinion published at 876 F.23 718, filed September 19, 1989. This Order is reproduced in its entirety in appendix 1a.

important, however, is the absence of a sham contract in Overby. Overby simply was not a winable retaliation case and cannot be compared to or set precedent for the case at bar.

C. The decisions of other circuits can also be distinguished on the facts.

Fairchild cites a number of cases from other circuits which appear to support their contentions. A close examination of each and every one will reveal a factual setting more closely related to the Ninth Circuit's Overby and not at all like the facts of this matter. For this reason, these cases are not persuasive authority for this matter nor can it be said that a split exists between circuits sufficient to support this writ.

II.

This Court's decision in Parklane Hosiery Co. v. Shore[4/] is not on point and cannot be precedent. The same is true of Lytle v. Household Manufacturing, Inc.[5/] Collateral estoppel cannot be used to prevent retrial of erroneously dismissed legal claims.

A. The decision in Parklane only applies when there are separate, distinct trials at different times. It does not apply to trials where similar claims both equitable and legal are tried in the same proceeding. All circuits are in accord on this issue.

[4/] 439 U.S. 322, 99 S.Ct. 645 (1979)

[5/] No. 86-1097, Slip Op. (4th Cir. 1987), cert. granted, 109 S.Ct. 3239 (1989)

B. In Lytle and other similar cases the Fourth Circuit has applied collateral estoppel as Fairchild asserts only in situations where plaintiffs have failed to prove a prima facie case. Even this narrow application is set for review by this court. In this matter all parties concede that respondents proved a prima facie case. Lytle, therefore, would not operate to bar retrial of this matter even in the Fourth Circuit. The outcome of this court's review of Lytle should not affect this matter.

CONCLUSION

Fairchild's retaliatory motive at the time of contracting with Respondents belies any assertion that it "made a contract" with Respondents.

Fairchild's non-contracting state of mind at the time of contract formation was clearly shown by the immediate firings. Firings which took place before Fairchild even began to perform its alleged contract "promises". This conduct is outlawed under Section 1981 and Patterson. There is no split among the circuits or within the Ninth Circuit on facts such as these.

Parklane does not apply to a single intergrated trial. Lytle was a case where plaintiff did not prove a prima facie case. The holding in Lytle or its resolution before this court should not impact the Ninth Circuit opinion in this matter.

Respondents respectfully request that the Court deny Fairchild's petition.

Respectfully submitted,

TYRON J. SHEPPARD
Attorney for Respondents

Dated: January 16, 1990

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANE MILLER and PAMELA LEWIS,
Plaintiffs-Appellants.

v.

FAIRCHILD INDUSTRIES, INC., a Maryland Corporation,
Defendant-Appellee.

No. 87-6325

D.C. No. CV-83-3509-JMI

ORDER

Filed September 19, 1989

Before: Betty B. Fletcher, Harry Pregerson and William C. Canby, Jr., Circuit Judges.

ORDER

Appellants' petition for rehearing is granted to the following extent. The opinion, published at 876 F.2d 718, is amended as follows:

On page 721, the first paragraph is amended to read as follows:

Pamela Lewis and Diane Miller appeal the district court's dismissal of their Title VII claim alleging that Fairchild Industries discharged them in retaliation for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC). They also appeal the district court's dismissal of their claims for the negligent and intentional infliction of emotional distress, the directed verdict on their retaliation claims brought under 42 U.S.C. § 1981 and the California Fair Employment and Housing Act (CFEHA), and

the directed verdict on their claims for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, and fraud. Finally, they appeal a number of the district court's pretrial rulings and evidentiary rulings during trial. We affirm the directed verdict on the tortious breach claim, but reverse the dismissal of the Title VII claim and the emotional distress claims and the directed verdict on the breach of contract, fraud, Section 1981, and CFEHA claims. We remand for a new trial. [Footnote One remains at the end of this paragraph and in its current form.]

On page (726,) the last paragraph is amended to read as follows: (5421)

We conclude that the district court erred in directing a defense verdict on the Section 1981 and the CFEHA claims; we reverse and remand for a new trial on those causes of action. We also vacate the Title VII judgment and remand for a new trial on the appellants' Title VII claim. The Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits have held that, where an employee brings an equitable discrimination claim (e.g., Title VII) and a legal discrimination claim (e.g., § 1981) against an employer based on the same facts, the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations in deciding the legal claim. *See, e.g., Roebuck v. Drexel University,* 852 F.2d 715, 737 (3d Cir. 1988) ("with one possible exception, every circuit to have ruled on the issue has held that the jury's findings on a § 1981 claim are binding on the trial judge's resolution of a concurrently tried Title VII claim."); *Volk v. Coler,* 845 F.2d 1422, 1438 (7th Cir. 1988) ("because the district court would have been bound by the jury's verdict on related issues, unless it set the jury verdict aside, and our decision reverses the §§ 1983 and 1985(3) claims, the judgment entered on all of the plaintiff's Title VII claims must also be reversed."); *Wade v. Orange County Sheriff's Office,* 844 F.2d 951, 954-55 (2d Cir. 1988); *Ward v. Texas Employment Commission,* 823 F.2d 907, 908-09 (5th Cir. 1987); *Garza v. City*

of Omaha, 814 F.2d 553, 557 (8th Cir. 1987); *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir. 1983). *See also Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 803-04 (D.D.C. 1984) (then-circuit Judge Scalia observed that if the plaintiff, whose Title VII claim had been rejected by the district court after trial, were allowed to add common-law tort claims to her Title VII claims, then "[n]ot only would a jury trial on her tort claims be required, but the Title VII judgment — even if otherwise valid — would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury."). We view these holdings as consistent with Supreme Court precedent and the respect that properly is accorded to a jury verdict in our system of jurisprudence. *See Tull v. United States*, 481 U.S. 412, 425 (1987) (citation omitted) (where there are "separate and distinct statutory provision[s]," one of which authorizes legal relief and one of which authorizes equitable relief, "if a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.' "); *but see Lytle v. Household Manufacturing Co.*, 831 F.2d 1057 (4th Cir. 1987) (unpublished disposition holding that a "district court's findings in [a] Title VII trial collaterally estop [a plaintiff] from relitigating these findings before a jury"), *cert. granted*, 109 S.Ct. 3239 (1989). Accordingly, we hold that, on remand, the district court in deciding the Title VII claim will be bound by all factual determinations made by the jury in deciding the Section 1981 and CFEHA claims.

On page (729,) the second full paragraph is amended to read as follows: (5425)

The subsequent failure to perform a promise warrants an inference that the promisor did not intend to perform. *See Rambo v. Blain*, 263 Cal. App. 2d 158, 163, 69 Cal. Rptr. 132, 135 (1968); *Boyd v. Bevilacqua*, 247 Cal. App. 2d 272, 292, 55 Cal. Rptr. 610, 623-24 (1966). Here, Fairchild did not provide Miller and Lewis with promised training opportunities

because it discharged them within two months after negotiating the agreements. This subsequent conduct coupled with the other evidence presented by Miller and Lewis could support a finding that Fairchild did not intend to perform its promises when it signed the agreements. *See Boyd*, 247 Cal. App. 2d at 292; *Tenzer v. Superscope, Inc.*, 39 Cal.3d 18, 216 Cal.Rptr. 130, 137 (1985).

On page 734, the last paragraph is amended to read as follows: (5436)

We affirm the directed verdict on the claim for tortious breach of the implied covenant of good faith and fair dealing. We reverse the dismissal of the Title VII claim and the emotional distress claims and the directed verdict on the breach of contract, fraud. Section 1981 and CFEHA claims. We remand for a new trial.

California Employment Law Council's motion to file an amicus brief is granted.

The petitions for rehearing and suggestions for rehearing en banc and this order have been circulated to the full court. No member of the court has requested rehearing beyond the amendments provided in this order. Accordingly, the appellee's petition for rehearing and suggestion of rehearing en banc are denied.

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